Recent Decisions

CIVIL PROCEDURE—COLLATERAL ESTOPPEL

Plaintiff sued in Common Pleas court for personal injuries arising out of an automobile accident. Defendant answered that in a previous action in Cincinnati Municipal Court, defendant had recovered judgment for property damages arising out of the same accident. Plaintiff demurred. *Held,* since the prior action decided the issue of negligence, plaintiff's demurrer to the defense of estoppel or res judicata is overruled. *Vaughn v. Melzer,* 46 Ohio Op. 73, 102 N.E. 2d 487 (1951).

The principal case is an excellent illustration of what the RESTATEMENT OF JUDGMENTS calls collateral estoppel. Section 68 (1) reads as follows:

> Where a question of fact essential to the judgment is is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action. . . .

Section 70 states that both causes of action must have arisen out of the same subject or transaction. The Ohio Supreme Court has called this doctrine "estoppel by judgment". *Hixon v. Ogg,* 53 Ohio St. 361, 42 N.E. 32 (1895); *Vasu v. Kohlers Inc.,* 145 Ohio St. 321, 61 N.E. 2d 707 (1945). An earlier appellate case with similar facts, *Allamong v. Falkenhof,* 39 Ohio App. 515, 177 N.E. 789 (1930), might have been cited as authority for the *Vaughn v. Melzer* decision.

The plaintiff, defendant in the prior action, relied upon a former code provision in the Cincinnati municipal court act, Ohio General Code § 1558-10, which gave the defendant the right to withhold setting out a counterclaim when such claim was greater than the amount for which the municipal court was authorized to enter judgment. Section 1602 (f) of the new municipal court act, effective January 1, 1952, reads "Any party defendant may at his option, withhold setting up any statement of counterclaim and make the same the subject of a separate action." As a result, such a case as the principal case, which arose under the old statutory provision, may easily arise under the new Ohio municipal court act. See Wills, *The New Ohio Municipal Court Act,* 12 OHIO ST. L. J. 314, at page 324 (1951).

The Ohio Supreme Court in *Vasu v. Kohlers Inc., supra,* held that injuries to both person and property suffered by the same person as a result of the same wrongful act were infringements of different rights and gave rise to two distinct causes of action. Thus in Ohio a

personal injury judgment cannot operate as a merger or bar to a subsequent property damage action and vice versa. As the principal case illustrates, however, issues determined in the first action may be conclusive as to the second on the doctrine of collateral estoppel. When the issue of negligence or contributory negligence has been determined in an action for property damages, that determination may be conclusive upon the parties in a later suit by the same plaintiff for personal injuries based upon the same accident.

As the principal case states, public policy demands that litigation shall not be interminable. See Scott, *Colateral Estoppel By Judgment,* 52 HARV. L. REV. 1 (1942). On the other hand, in cases like the instant one, refusal to allow a later action may impose a hardship since it may be impossible to ascertain the full extent of personal injuries in time to set up a counterclaim. While in theory the absence of a counterclaim should have no effect on a jury's decision of the issues of negligence and contributory negligence, the practical effect of a counterclaim alleging personal injuries may be great, especially in a close case. Thus, defense attorneys should not fail to assert a counterclaim unless there is some overriding consideration against it.

James D. Oglevee

CONTRACTS—RESCISSION OF BIDS FOR UNILATERAL MISTAKE

The plaintiff submitted a bid to the defendant for public construction work. The bid was substantially lower than it should have been because of the plaintiff's omission of one item in calculating the total bid price. The plaintiff discovered the error a few hours later and so notified the defendant. Subsequently, with knowledge of the error, the defendant accepted the original bid. The city charter provided that such bids were irrevocable, and the bid form stated that bidders would not be released because of errors. The plaintiff sued to cancel the bid and obtain a discharge of its bid bond. The defendant counter-claimed for forfeiture of the bond and damages. The trial court ruled for the plaintiff. On appeal, *held,* affirmed. The omission of the one item was a material mistake, not caused by the neglect of legal duty, which entitled the plaintiff to rescind the bid, the defendant having knowledge of the error before its acceptance was given. *M. F. Kemper Construction Co. v. City of Los Angeles,* 37 Cal. 2d 696, 235 P. 2d 7 (1951).

As a general rule, a contract will not be reformed for unilateral mistake. *Meade v. Brown,* 218 Mich. 556, 188 N. W. 514 (1922); *Rosenblum v. Manufacturer's Trust Co.,* 270 N. Y. 79, 200 N. E. 587 (1936). Nor will such a mistake, in itself, render the transaction

voidable. RESTATEMENT, CONTRACTS § 503 (1932); RESTATEMENT, RESTITUTION § 12 (1937). However, equitable relief by way of rescission may be given if the mistake is a material feature of the contract, if the enforcement of the contract as made would be unconscionable, if the mistake was made notwithstanding ordinary diligence by the party making it, and if the other party may be put in status quo. *Frazier v. State Bank,* 101 Ark. 135, 141 S. W. 941 (1911); *Geremia v. Boyarsky,* 107 Conn. 387, 140 Atl. 749 (1928); 3 POMEROY'S EQUITY JURISPRUDENCE § 870 (5th ed. 1941).

However, in cases where the mistake has been made in a bid for a construction contract there is a notable conflict of authority. This is particularly true in those cases involving public contracts where character or statutory provisions make the bids irrevocable, as in the principal case. Generally, where relief has been given, the courts seem disposed to consider the equitable principles expressed above. *Moffett, Hodgkins and Clarke Co. v. Rochester,* 178 U. S. 373 (1900); *Board of Regents v. Cole,* 209 Ky. 761, 273 S. W. 508 (1925). In those cases denying relief, the courts appear to be guided by the objective theory of mutual assent, emphasizing stability and definiteness in contractual relations. *Baltimore v. J. L. Robinson Construction Co.,* 123 Md. 660, 91 Atl. 682 (1914); *John J. Bowers Co. v. Milton,* 255 Mass. 228, 151 N. E. 116 (1926). These underlying predispositions as to the propriety of granting relief for unilateral mistake are as much a cause of the conflict in the cases as are factual distinctions. A few examples may serve to illustrate the proposition asserted. In *St. Nicholas Church v. Kropp,* 135 Minn. 115, 160 N. W. 500 (1916), it was held that the omission of an item in computing the total cost was not negligence which would bar relief. The court in that case distinguished *Steinmeyer v. Schroeppel,* 226 Ill. 9, 80 N. E. 564 (1907), where it was held that a mistake in addition was such negligence. In *Barlow v. Jones,* 87 Atl. 649 (N. J. 1913), where an item was overlooked in determining the final bid price, the court acknowledged that the bidder was a sick man and that, regardless, the error was not gross negligence. But in *Grant Marble Co. v. Abbot,* 142 Wis. 279, 124 N. W. 264 (1910), the bidder was in a state of mental distress, yet the court held that his error in basing his bid price on a building of five stories rather than six did not entitle him to relief. The haste with which the bid was prepared in *Board of School Commissioners v. Bender,* 36 Ind. App. 164, 72 N. E. 154 (1904), was a factor in excusing error. But in *C. H. Young v. Springer,* 113 Minn. 382, 129 N. W. 773 (1911), the bidder was held liable for breach of contract although error was brought about primarily because it was calculated at a time when the bidder was without his glasses.

That the equitable doctrine is the best means of rendering complete justice in the individual case is hardly questionable. Con-

versely, the facts of the principal case illuminate the possibility that blind adherence to the legal doctrine of objective mutual assent can result in a decision contrary to our ideas of fair play and moral justice. The defendant had knowledge of the error well before it had accepted the bid or had acted in reliance thereon. A court of conscience would ignore the obligation placed upon it if it were to convert an innocent omission by one party into an unconscionable gain for the other. Two strong advocates of the objective assent theory have made an exception of this situation in which the other party has knowledge of the mistake. 5 WILLISTON, CONTRACTS § 1573 (revised ed. 1937); RESTATEMENT, CONTRACTS § 503, Comment a (1932). However, the dissenting opinion in the principal case indicates that this is a real danger rather than a groundless apprehension on the part of the writer.

Richard G. Ison

FEDERAL EMPLOYER'S LIABILITY ACT—VALILITY OF RELEASE—FEDERAL LAW APPLIES—ISSUE OF FRAUD IS FOR THE JURY

This was an action under the Federal Employer's Liability Act for injuries sustained during employment and alleged to have been caused by the negligence of the defendant railroad. The defendant pleaded a release signed by the plaintiff as a defense. The plaintiff admitted the signing, but claimed that the release was void for fraud in the inducement. The Ohio Supreme Court, in overruling the court of appeals and reinstating the trial court's judgment for the defendant, held that Ohio law applied as to the validity of the release and that the issue of fraud was one for the court, but could be submitted to the jury in an advisory capacity, their decision not being binding on the court. On certiarori to the U.S. Supreme Court, *held,* (5-4), reversed; federal law was applicable and the issue of fraud was for the jury. The dissenting opinion concurred in the reversal, but denied that the act requires the issue of fraud in such a case to go to the jury *Dice v. Akron, Canton, & Youngstown Rd.,* 342 U.S. 359 (1951).

Soon after the passage of the Federal Employer's Liability Act, 35 Stat. 65 (1908), as amended, 45 U.S.C. §51 (1939), and for many years prior to this case, it seemed well settled that federal law, rather than state law, should govern in the interpretation and application of the act. The reasoning behind this was that the application of federal law was necessary in order to avoid the defeat of a federally declared standard by a more rigid state law and to insure uniform application of the act throughout the country, which was so essential to its purpose. *Second Employer's Liability Cases,* 223 U.S. 1 (1912);

New Orleans & N.E. Ry. v. Harris, 247 U.S. 367 (1918); *Ricketts v. Pennsylvania Rd.,* 153 F.2d 757 (1946); *Thompson v. Camp,* 163 F.2d 396 (1947), *cert. denied,* 333 U.S. 831 (1947); *Chesapeake & O. Rd. v. Kuhn,* 284 U.S. 44 (1931). The Ohio Supreme Court, in several cases prior to the principal case, followed that rule. *Baltimore & O. S.W. Rd. v. Bailey,* 99 Ohio St. 312 (1919); *New York, Chicago, & St. L. Rd. v. Biermacher,* 110 Ohio St. 173 (1924); *Bevan v. New York, Chicago, & St. L. Rd.,* 132 Ohio St. 245 (1937), *cert. denied,* 301 U.S. 695 (1937).

In the *Ricketts* case, *supra,* it was expressly decided that the validity of a release under the act is a question to which federal law should be applied. Judge Jerome Frank, in a concurring opinion, went on to say that such releases should be treated like those of seamen under the Jones Act, 41 Stat. 988 (1920), as amended, 46 U.S.C. § 861 (1920). Under that act the burden is on the employer to show the fairness of the release. *Garrett v. Moore McCormack,* 317 U.S. 239 (1942).

But the United States Supreme Court in *Callen v. Pennsylvania Rd.,* 332 U.S. 625 (1948), held that the burden of proof was on the releasor in a similar case under the Federal Employer's Liability Act. Mr. Justice Jackson, writing the majority opinion, said that although Judge Frank's views in the *Ricketts* case, *supra,* were appealing, it was a matter for Congress, not the courts, and that "until the Congress changes the statutory plan, *the releases of railroad employees stand on the same basis as the releases of others.*" It was upon this opinion that the Ohio Supreme Court based their decision that state law was applicable. They held, in effect, that the *Callen* case, *supra,* overruled the *Ricketts* case, *supra,* and left to be settled by state law those transactions different from, but affected by, the federal act.

Apparently, however, the United States Supreme Court in the *Callen* case, *supra,* did not intend to overrule the holding of the *Ricketts* case, *supra,* that the validity of a release under the act was a matter to be settled by federal law. They rejected Judge Frank's view as to the relevance of the Jones Act, but that was as far as they intended to go.

Had the Ohio Supreme Court applied federal law to the case, the question of whether the issue of fraud was for the jury probably would not have arisen. Under federal law deliberate misrepresentations of the content of the release would render the release void, and under Ohio law a release alleged to be void for fraud is not a bar to the plaintiff's action and the factual question of fraud goes to the jury at the court's discretion. *Flynn v. Sharon Steel Corp.,* 142 Ohio St. 145 (1943).

Ohio, however, recognizes a distinction between fraud in the factum, rendering the release void, and fraud in the inducement, rendering it voidable. *Picklesimer v. Baltimore & O. R.R.,* 151 Ohio

St. 1 (1949); *Meyer v. Meyer,* 153 Ohio St. 408 (1950); 19 O. Jur. 332. Since the plaintiff here was able to read and was not denied an opportunity to read the release, the court held that his failure to comprehend its terms, due to the fraudulent misrepresentations of the defendant, constituted fraud in the inducement. Fraud in the inducement makes the contract voidable only; therefore, under Ohio law, the issue of fraud must be decided by the court before the plaintiff can continue his action. *Perry v. O'Neil Co.,* 78 Ohio St. 200 (1908); *Flynn v. Sharon Steel Corp.,* 142 Ohio St. 145 (1943).

It was to this fragmentation of the question of fraud that the United States Supreme Court objected. The majority of the court held that the right to a jury was an important feature of the Federal Employer's Liability Act and was too substantial a part of the rights afforded by the act to permit it to be defeated by state procedure. *Brown v. Western R.R. of Alabama,* 338 U.S. 294 (1944). The dissenting element of the court, however, pointed out that state courts are under no duty to set up a special procedure for negligence actions brought under a federal statute, and that states are not required to meet the jury requirements of federal courts under the Seventh Amendment to the Constitution. *Minneapolis & St. Louis R.R. Co. v. Bombolis,* 241 U.S. 211 (1916). The only limitation to the state court's procedure should be that it treats actions under the act in the same manner as other negligence actions. This the Ohio Supreme Court did.

It should be pointed out that the large majority of state jurisdictions provide that equitable defenses to an action at law should be decided by the court before the case goes to the jury. CLARK ON CODE PLEADING 104 (2nd ed. 1947); WALSH ON EQUITY 117.

It was well established before this case that federal law governs in the application of the Federal Employer's Liability Act, but the ruling that the act requires the issue of fraud to be decided by the jury, though contrary to the ordinary procedure of the state court in which the action was brought, is not firmly established by this five to four decision.

William R. Hapner, Jr.

PLEADING—JOINDER OF CONCURRENT TORTFEASORS

Plaintiff, a passenger on a streetcar of the Cincinnati Street Railway Co., was injured in a collision between the streetcar and a truck operated by Walker. The plaintiff joined the Railway Co. and Walker as defendants on the theory that the injuries sustained were

by the trial court. On appeal, *Held,* reversed. Joinder of defendants is proper where an injury is proximately caused by the independent but concurrent wrongful acts of two or more persons, even though the parties were not acting in concert in the execution of a common purpose and the want of care of the defendants may not have been of the same character. *Meyer v. The Cincinnati Street Ry. Co.,* 157 Ohio St. 38, 104 N.E. 2d 173 (1952).

The early common law limited joinder of defendants to situations where concert of action and mutual agency were present. This concert requirement was developed before the law recognized negligent torts, but was later carried over to apply to joinder of negligent as well as to joinder of intentional tortfeasors.

PROSSER, TORTS 1098 (1941), and cases cited. The enactment of the codes, with the aim of settling all questions connected with a transaction in a single suit, would seem to dispel the view that concert of action was still a necessary element for joinder of defendants. Section 11255 of the Ohio General Code, a typical code provision, states:

> Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of a question involved therein.

Notwithstanding the intent of the new codes, courts were at first reluctant to dispense with the common law requirement. Few of the opinions even mentioned the code in deciding the issue of whether the joinder was proper. In recent years ,the vast majority of the courts no longer require concert of action as a prerequisite for proper joinder of defendants when their independent acts combine to produce a single injury. *Glazener v. Safety Transit Lines,* 196 N.C. 504, 146 S.E. 134 (1929); *McDonald v. Robinson,* 207 Iowa 1293, 224 N.W. 820 (1929); *Wery v. Seff,* 136 Ohio St. 307, 25 N.E. 2d 692 (1940), noted 7 OHIO ST. L.J. 278 (1941); RESTATEMENT, TORTS § 879 (1934).

Although the rule that concert of action is not required is well settled in most jurisdictions, there had been conflict in the cases when the duty of care owed to the plaintiff by the defendants is of a different character. The majority of courts have ruled that it should make no difference that one defendant may have the duty of exercising ordinary care and the other defendant the duty of exercising the highest degree of care toward the plaintiff, inasmuch as the jury can be instructed as to the duty of each. *Matthews v. Delaware L. & W. R. Co.,* 56 N.J.L. 34, 27 Atl. 919 (1893); *Carlton v. Boudar,* 118 Va. 521, 88 S.E. 174, 4 A.L.R. 1480 (1916); *Floyd v. Williams,* 54 Ga. App. 557, 188 S. E. 467 (1936).

Confusion in the Ohio law resulted from the third paragraph

of the syllabus of *Stark County Agricultural Society v. Brenner,* 122 Ohio St. 560, 172 N.E. 659 (1930), which states:

> Joint liability for torts only lies where wrongdoers have acted in concert in the execution of a common purpose and where the want of care of each is of the same character as the want of care of the other.

Later Ohio Supreme Court cases have permitted the joinder of concurrent tortfeasors without requiring a common purpose or the same want of care, but these cases did not directly overrule the *Brenner* case. *Wery v. Seff, supra; Larson v. The Cleveland Railway,* 142 Ohio St. 20, 50 N.E. 2d 163 (1943); *Maloney v. Callahan,* 127 Ohio St. 387, 188 N.E. 656 (1933). As a result, the Appellate Court for the Second District held joinder improper on the authority of the *Brenner* case. *Seabold v. City of Dayton,* 56 Ohio L. Abs. 417, 92 N.E. 2d 701 (1949).

The principal case shows unequivocally that Ohio has adopted the position of the majority of the courts by specifically overruling the *Brenner* case. This view is in conformity with Ohio Gen. Code § 11255 and is the more realistic approach to the joinder problem, in that it will avoid multiplicity of suits and eliminate inconsistent verdicts that may result if the defendants are sued in separate actions. Although the principal case has taken a step forward in clarifying and liberalizing the Ohio law pertaining to permissive joinder of concurrent tortfeasors whose actions inflict an indivisible injury to the plaintiff, yet, it does not disturb the distinction between primary and secondary liability in determining whether joinder is proper. Ohio has consistently ruled that a party whose liability is entirely secondary cannot be joined with a primary tortfeasor if on the face of the petition the fact of primary and secondary liability appears. *Bello v. City of Cleveland,* 106 Ohio St. 94, 138 N.E. 526 (1922); *Canton Provision Co. v. Gauder,* 130 Ohio St. 43, 196 N.E. 634 (1935).

Probably the most familiar case is that of joining the master and the servant, where the only wrong charged to the master is vicarious liability based on the employer-employee relationship. Joinder is disallowed in this and other situations where primary and secondary liability are involved, on the theory that there is no joint liability. *Losito v. Kruse,* 136 Ohio St. 183, 24 N.E. 2d 705 (1940); *Kniess v. Armour and Co.,* 134 Ohio St. 432, 17 N.E. 2d 734 (1938); *Cowley v. Bolander,* 120 Ohio St. 553, 166 N.E. 677 (1929).

Thomas E. Cavendish

STATUTES OF LIMITATIONS—MALPRACTICE—WHEN DOES THE CAUSE OF ACTION ACCRUE

Plaintiff's petition alleged that during the course of an operation performed by the defendant on December 8, 1942, surgical sponges were inserted into the abdominal cavity of the plaintiff. One of the sponges was negligently left in the wound and the incision was closed. The plaintiff was not treated by the defendant after the operation. On December 28, 1948, a surgeon other than the defendant performed an operation on the plaintiff, at which time the sponge was discovered at the site of the previous operation performed by the defendent. The plaintiff commenced an action for malpractice on October 28, 1949. The trial court sustained the defendant's demurrer on the ground that the action was barred by the statute of limitations and dismissed the plaintiff's petition. OHIO GEN. CODE § 11225. The court of appeals affirmed. On appeal to the Ohio Supreme Court, *held,* affirmed. The plaintiff's cause of action was barred by the statute of limitations since one year had elapsed after the termination of the physician-patient relationship. *De Long v. Campbell, Exrx.,* 157 Ohio St. 22, 104 N.E. 2d 177 (1952).

The Supreme Court of Ohio has by this decision affirmed its prior interpretation of the Statutory limitation for malpractice. *Gillette v. Tucker,* 67 Ohio St. 106, 65 N.E. 865 (1902); *Bowers v. Santee,* 99 Ohio St. 361, 124 N.E. 238 (1919); *Amstutz v. King,* 103 Ohio St. 674, 135 N.E. 973 (1921). The statute provides, "An action for . . . malpractice . . . shall be brought one year after the cause thereof accrued." OHIO GEN. CODE § 11225. As interpreted, the limitation period begins to run, at the latest, on the termination of the physician-patient relationship, whether or not the injured person knows of the act of malpractice. The principal case illustrates the obvious hardship on the patient when this rule is applied to a situation where it is inherently impossible to know of the injury. The court insists it is the function of the legislature to remedy such a hardship.

This is not a problem peculiar to Ohio since a like statutory limitation for malpractice is found in many other jurisdictions. N.Y. CIV. PRAC. ACT § 50 (1947); CALIF. CODE CIV. PROC. § 340, subd. 3 (1949); MASS. GEN. LAW c. 260, § 4 (1943). Most of these courts have disregarded the hardship to the injured person and interpreted the statutes strictly, holding that the limitation period begins to run at the time of the wrongful act or omission, regardless of non-discovery. *Capucci v. Barone,* 266 Mass. 578, 165 N.E. 653 (1929); *Conklin v. Draper,* 241 N.Y. Supp. 529, *aff'd,* 254 N.Y. 620, 173 N.E. 892 (1930); *Becker v. Porter,* 119 Kan. 626, 240 P. 584 (1925); 144 A.L.R. 212 (1943); 54 C.J.S. 142. This majority view adopts the accepted tort theory that a cause of action based on negligence accrues when the

wrongful act produces injury, howsoever slight. Injury is in effect presumed when a foreign substance is left in the wound.

California and Louisiana have adopted the "discovery doctrine" as an exception to the general rule. It completely relieves the injured patient from any possible hardship since the limitation period does not commence to run until the patient discovers that a foreign substance has been left in his body, or through the use of reasonable diligence should have discovered it. *Ehlen v. Burrows,* 51 Cal. App. 2d 141, 124 P. 2d 82 (1942); *Perrin v. Rodriguez,* 153 So. 555, (La. App. 1934). Justification for this exception is based on the policy that a person should not be precluded from suit on a cause of action that he cannot possibly know exists.

The rule adopted in Ohio, that the limitation period begins to run at the termination of the physician-patient relationship, is more liberal than the majority rule, but it has been criticized for its dubious reasoning. 16 HARV. L. REV. 454 (1903); 37 HARV. L. REV. 272 (1923). Nevertheless, it has found an increasing number of followers. *Schmit v. Esser,* 178 Minn. 82, 226 N.W. 196 (1929); *Thatcher v. De Tar,* 351 Mo. 603, 173 S.W. 2d 760 (1943); *Hotelling v. Walther,* 169 Or. 559, 130 P. 2d 944 (1942); *Pickett v. Aglinsky,* 110 F. 2d 628 (1940). This rule, unlike the majority rule, does not view the first negligent act and the first injury produced therefrom as the cause of action; rather, the gist of the cause of action is the continuous breach of duty in not finding and removing the sponge. In other words, the surgeon is guilty of malpractice throughout the entire relationship for not repairing the damage he has done. A logical criticism of this theory is that the malpractice being complained of is the initial negligence in the operation and not the surgeon's negligence in failing to detect it at a later time during the treatment.

The "treatment theory" adopted in Ohio was apparantly intended to circumvent a harsh statute of limitations. In many cases it has been successful, but there are still situations like the principal case where it fails. Only the "discovery doctrine" can alleviate the hardships that result in these situations. Since the courts will not accept the "discovery doctrine," the legislature now holds the key to the remedy. It would be nothing new for the General Assembly to extend a statute of limitation by the "discovery doctrine." It was extended to safeguard a landowner's cause of action against underground trespassers. OHIO GEN. CODE § 11224. The same should be done to the malpractice statute of limitations.

It is only fair to say that an extension of the limitation period by the "discovery doctrine" might place an undue hardship on the surgeon, as in the principal case where the injury was not discovered until six years after the operation. A surgeon would be compelled to retain his records an unlimited period of time for every operation he

performs in order to protect himself against such belated litigation. Conceding this, it seems the law should favor those who have incurred injury and not the wrongdoer. This is not the case of an injured person knowing of his rights and resting on them while the evidence becomes lost. It is rather the case of a person who has just learned of the cause of his injury and asks that redress be given for the wrong done.

Charles E. Shanklin

WILLS—IMPLIED REVOCATION

Testatrix bequeathed her entire estate to defendant, by codicil. It did not appear on the face of the codicil that it had been executed in contemplation of a marriage between the testatrix and the defendant. But more than a year later they were married. Ten years later the testrix and the defendant entered into a property settlement which was followed by a divorce. The testatrix never expressly revoked the codicil to her will. She died five months later. Upon her death, her heirs at law contested the will. The Court of Common Pleas found that the divorce coupled with a property settlement was such a change of circumstances as would revoke a will by operation of law. The Court of Appeals reversed, saying that the facts and circumstances were insufficient to constitute an implied revocation under the Ohio General Code Section 10504-47. On appeal, *held,* affirmed. Due to the peculiar facts of this case, it could not be conclusively shown that there was such a change of circumstances as would effect an implied revocation of the codicil. *Codner et al. v. Caldwell et al.,* 156 Ohio St. 197, 101 N.E. 2d 901 (1951).

It is an old and well established rule at common law that changes in the domestic relations of the testator can be such as to effect a revocation of his will by implication. 1 Page on Wills Section 507 (3d ed. 1942). This theory of revocation by operation of law has gained wide acceptance in the United States, and has been incorporated into the statutes of most of the states in one form or another. The purpose of this type of revocation is to give effect to the presumedly altered intention of the testator resulting from such changed circumstances. Some states have enacted statutes, which enumerate a number of situations which will effect a revocation, but which fail to include a provision for implied revocations. A distinct conflict has arisen as to whether these enumerations exclude the implied revocation. *See, e.g.* Re *Patterson's Estate,* 64 Cal. App. 643, 222 Pac. 374 (1923); *Davis v. Fogle,* 124 Ind. 41, 23 N.E. 860 (1890) (enumerations exclude implied revocation); *Fallon v. Chidester,* 46 Iowa 588 (1877); *Redmond v. Redmond,* Texas Appeals, 127 S.W. 2d 309

(1939) (enumerations do not exclude implied revocation). Other states have enacted enumerative revocation statutes with a general provision providing that "nothing herein contained shall prevent the revocation implied by law, from subsequent changes in the condition or circumstances of the testator". Mass. Gen Laws. c. 191 Sec. 8 (1932). To the same effect: Mich. Comp. Laws Sec. 702.9 (1948); Neb. Rev. Stat. Sec. 30-209 (1943); Wis. Stat. Sec. 238.14. This latter type of statute leaves open a broad area for judicial extension of the doctrine of revocation by operation of law. Ohio's statute is of this type. Ohio Gen. Code Sec. 10504-47.

Under the statutes of the large majority of states, it is unanimously held that divorce alone will not be such a change of circumstances as to support an implied revocation. *Charlton v. Miller,* 27 Ohio St. 298, 22 Am. Rep. 307 (1875); *Card v. Alexander,* 48 Conn. 492, 40 Am. Rep. 187 (1881); Re *Arnold's Estate,* 60 Nev. 376, 110 P. 2d 204 (1941); 68 C.J., Wills Sec. 542; Durfee, *Revocation of Wills by Subsequent Change in the Condition or Circumstances of the Testator,* 40 Mich. L. Rev. 406 (1942). A few states do have statutes expressly permitting divorce to effect such a revocation. *e.g.* Purd. Ann. Stat. (Pa.) tit. 20, Sec. 180.7 (2). But divorce coupled with a property settlement between the devisee and the testator is a circumstance of a different nature. Under those statutes which contain an express provision for revocation by implication it has generally been held that a divorce coupled with a property settlement is such a change in the domestic relations of the testator as would justify a conclusion by the court that the will had been impliedly revoked. *Lansing v. Haynes,* 95 Mich. 16, 54 N.W. 699 (1893); Re *McGraw's Estate,* 228 Mich. 1, 199 N.W. 686 (1924); *Donaldson v. Hall,* 106 Minn. 502, 119 N.W. 219 (1909); *Pardee v. Grubiss,* 34 Ohio App. 474, 171 N.E. 375 (1930). These courts have felt that it is "nearer in accord with justice and reason" that they should arrive at this conclusion. Re *Bartlett's Estate,* 108 Neb. 691, 190 N.W. 869 (1922). The more specific reasons given for the rule are: (1) that all legal and moral obligations between the parties are discharged. Re *Hall's Estate,* 106 Minn. 502, 119 N.W. 219 (1909); (2) that the property settlement bears a distinct resemblance to an ademption and therefore implies a revocation. Re *Bartlett's Estate, supra;* and (3) that generally speaking, it is more just and reasonable to suppose that the testator would not want to give his estate to one who had lost his love and affection for the testator.

This rule has not been followed unanimously, for occasional exceptional cases have found that these circumstances work no such implied revocation. *Hertrasis v. Moore,* 325 Mass. 57, 88 N.E. 2d 909 (1949); Re *Arnold's Estate,* 60 Nev. 376, 110 P.2d 204 (1941).

The wills in those cases were executed during coverture, indicat-

ing that those decisions are more diametrically opposed to the rule than is the instant case, where the codicil was executed prior to marriage. It is apparent that the principal case was decided upon the basis of an unusual fact situation and it appears that the court relied heavily upon these uncharacteristic facts to arrive at its decision.

It cannot be said that, with the decision of this case, Ohio is divorcing itself from the majority view of those states whose statutes expressly provide for implied revocation. Rather, it must be said that the Ohio Supreme Court is very strict in its application of the doctrine of implied revocation; and that before that doctrine will be applied, the facts must unquestionably support the inference that the testator intended to revoke his will. For as was said in the *Hertrais* case, *supra;* "it would be a serious matter to invalidate a will because of a supposed change in the intention on the part of a testator not given formal expression by him."

William Arthur